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# In the United States Circuit Court of Appeals

## For the Ninth Circuit

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THE PRUDENTIAL INSURANCE COM-  
PANY OF AMERICA, a corporation,  
and MUTUAL LIFE INSURANCE  
COMPANY OF NEW YORK, a Cor-  
poration,

*Plaintiffs in Error,*

VS.

MAUDE E. STEWART,

*Defendant in Error.*

No. 3918

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*Upon Writs of Error From the United States  
District Court for the Western District  
of Washington, Southern Division*

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### BRIEF FOR PLAINTIFFS IN ERROR

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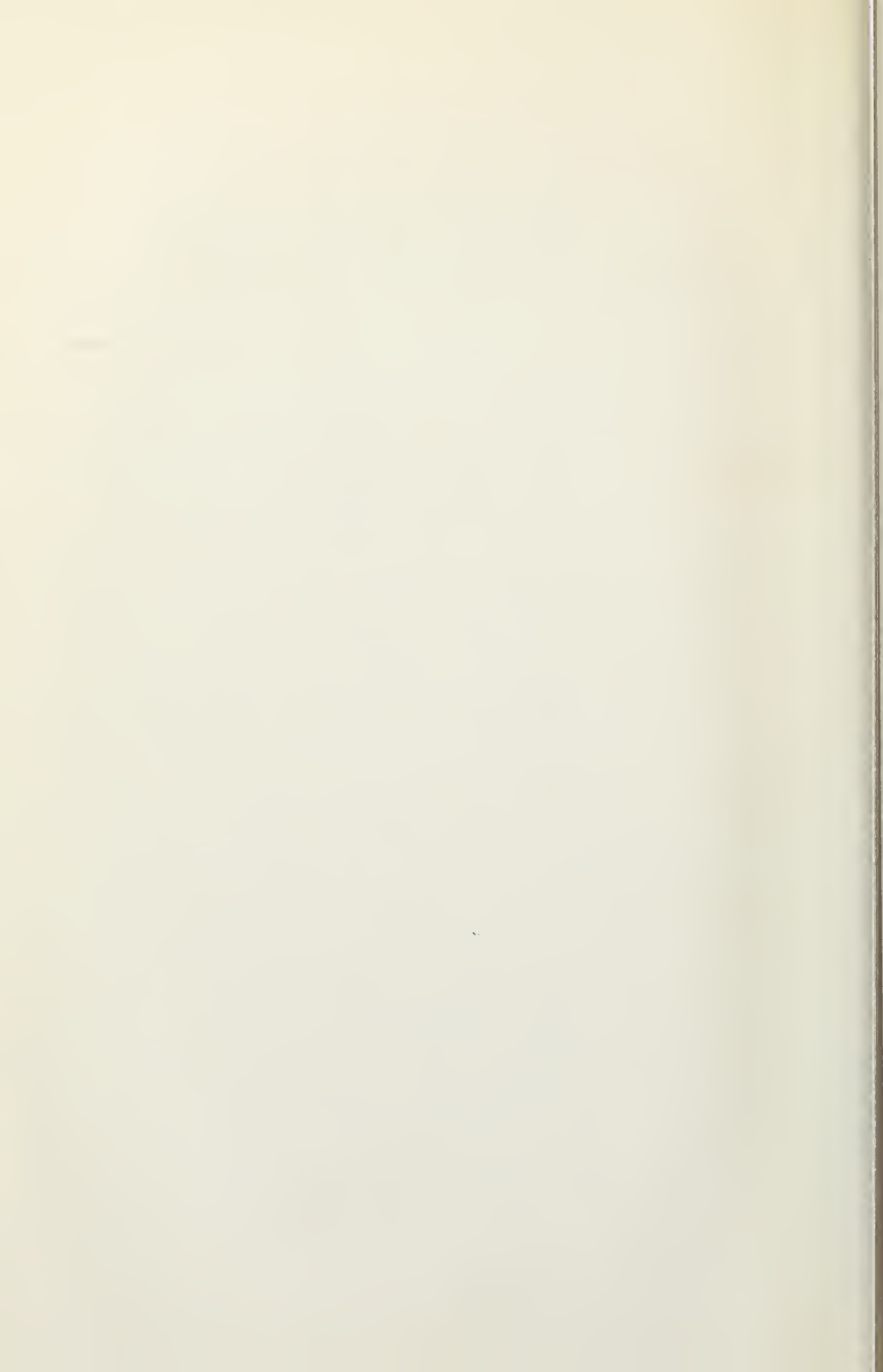


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### PRELIMINARY STATEMENT

On July 25th, 1921, an action was brought by Maude E. Stewart, Defendant in Error, against the Prudential Insurance Company of America upon three insurance policies on the life of Frederick L. Stewart, her husband, payable to her as sole beneficiary; one was issued August 17, 1915,

for \$5,000; one was issued August 7, 1916, for \$5,000, and the other was issued April 17, 1917, for \$25,000. At the same time, defendant in error brought another action against the Mutual Life Insurance Company of New York upon two insurance policies on the life of Frederick L. Stewart, her husband, payable to her as sole beneficiary; first policy was issued on July 15, 1915, for \$5,000; the other policy was issued July 28, 1915, for \$5,000. Both actions were brought in the United States District Court, for the District of Washington, Western District, Southern Division. After issues were joined in both cases, all parties thereto joined in a written stipulation, with the approval of the judge of the District Court, for the consolidation of the cases, for the purpose of trial, and they were so tried. A further stipulation was entered into by all parties to said actions waiving the right of trial by a jury, and the cases were so tried. Findings of Fact, Conclusions of Law, and Judgment thereon were entered by the Court on April 24, 1922, in favor of Defendant in Error and against the Plaintiffs in Error.

Thereafter, each of the said Insurance Companies sued out separate Writs of Error, but, by

written stipulation of all parties to said actions, it was agreed that in the perfection of the record in this court, only one Bill of Exceptions need be prepared, one Transcript and one Printed Record.

\* \* \*

## STATEMENT OF FACTS

For many years, Frederick L. Stewart was engaged in the banking business at Kelso, Washington. His bank was in an insolvent condition for at least ten years before his disappearance, although this precarious condition of the institution was not known in the community. The banking department of the State was cognizant of the bad condition of the bank for many years before Stewart disappeared. Stewart was aware of this knowledge on the part of the banking department but manifested no particular worry or anxiety on that account. In November, 1920, the state banking department made an examination, finding the bank in a very bad condition, notifying Stewart that the conditions in the bank must be changed. It appears that the requests were not, or could not be, complied with. On March 6, 1921, the banking department notified Stewart to come before the department at Olympia and he did so at once. Stewart was then notified by the banking department that he must resign as Cashier and



officer of the bank. He returned home, continued the operation of the bank without resigning until the 17th day of March, 1921, when the banking department took the bank over. The immediate reason for the banking department taking charge of the bank then was on account of a written report of its condition being forwarded by one Louis Plamondon to the department showing its hopeless insolvency. In response to that report, one Claude P. Hay, of the banking department came to Kelso on the 16th day of March, 1921, and in conjunction with Frederick L. Stewart, Louis Plamondon and the President of the bank, they remained in conference in the banking rooms until about two o'clock in the morning of March 17th. Hay did not then take charge of the bank, but suggested to Stewart that Stewart go with him to Portland that morning and see if the latter could not raise sufficient funds to guide the bank along without closing it. Their trip to Portland, for that purpose, was unsuccessful. About ten o'clock in the morning of March 17, Claude P. Hay informed Stewart that he (Hay) must return to Kelso and take charge of the bank which he did at about twelve o'clock that day. Stewart remained in Portland until about six o'clock that evening when he took the passenger train that



goes from Portland to Astoria, Oregon. Between these two points, the train passes through St. Helens, Goble and Rainier, in the order named. When Stewart and Hay left for Portland in the morning, other citizens of Kelso also went to Portland on the same train, and all expected to return on the six o'clock train to Rainier, taking a ferryboat there across the Columbia River and up the Cowlitz River to Kelso. The other Kelso citizens returned home by that train and by that ferryboat. Stewart got off at St. Helens and immediately employed an automobile to take him to Goble, arriving in the latter place just as the train, from which he dismounted, arrived there. He paid the automobile driver, introduced and made himself known and then remarked that he was going to a telephone to talk with his wife at Kelso. He went to the 'phone, and called up his house, the call being answered by a man by the name of Sardam. He did not talk with his wife nor ask to talk with her. He then went to the ferryboat Queen, got aboard to go across the Columbia River to Kalama. The Captain of the ferryboat and the man who acted as purser, testified that Stewart did not get off at Kalama. Beginning the next morning, and continuing for more than two weeks, the river was dragged by

all modern devices by several boats for the purpose of recovering his body. The body has never been recovered. A grip or handbag was left in the pilot house by Stewart, the brief case that he was carrying disappeared with him from the boat. Some time prior to March 17th, 1921, Stewart wrote his wife a letter or a statement which was found in the bank after his disappearance, giving her certain instructions and making some requests as to the payment of the insurance money. In this letter he intimated that "something might happen to him." He wrote another letter, dated March 17, 1921, evidently written at Portland, almost identical in language with the one written on the 15th. Aside from the intimations in both these letters, the record does not disclose that he ever stated to his friends or others that he contemplated suicide. On the 17th day of March, 1921, he had in full force and effect \$86,000 insurance on his life, and \$50,000 accident insurance. The trial of the actions proceeded upon the admitted theory by the plaintiff that he did not accidentally meet his death but did deliberately drown himself in the Columbia River.

Not only was the Kelso Bank insolvent but Stewart, individually, was also insolvent. Not

only so but he was, in addition, an embezzler of the funds of at least one estate for which he was administrator and he “faced criminal prosecutions from a dozen different sources.”

\* \* \*

## THE PLEADINGS

The complaints were in the ordinary form, making copies of the policies a part thereof, and praying judgment for the full amount of each policy.

The answers admitted the due execution of the policies, and that all premiums were fully paid on March 17th, 1921. Each denied the receipt of proofs of death, and denied the death of the insured.

No substantial evidence to support judgment in favor of Defendant in Error.

At the close of all the evidence offered by all parties to the actions, Plaintiffs in Error, duly challenged the substantiality of the evidence to justify findings or judgment in favor of Defendant in Error and prayed for the dismissal of the actions. They likewise challenged the sufficiency of the attempted proofs of death offered by beneficiary before suits were brought.

## SPECIFICATIONS OF ERROR RELIED UPON

Plaintiffs in Error contend that the lower court erred in the following particulars:

1. In permitting the witness Claude P. Hay, the bank examiner, to testify, in substance, as follows: I closed the bank, I found arms, pistols and a sawed-off shotgun. I unloaded them because I wanted to remove any opportunity that Mr. Stewart might have to do anything rash. I was a little concerned as to what he might do.

2. In permitting said witness to testify as follows: Plamondon called me up and asked me to come down to his house. When I stepped on the porch at Mr. Plamondon's house, the door was opened and as I stepped in he said, "Well, Fred has done it." I said, "Did he shoot himself?" and he said, "No, he went in the river."

3. In permitting H. E. McKenney to testify, in substance, to the financial condition of Stewart's estate, as shown by the probate proceedings.

4. In permitting the witness George F. Plamondon to testify, in substance, that he told the bank examiner, Hay, that Stewart made away with himself.

At the time the testimony was offered, as referred to in the preceding numbers, 1, 2, 3 and 4, defendant duly objected, an exception was taken and allowed.

5. In admitting and receiving in evidence plaintiff's Exhibit "20," being the affidavit of Maude E. Stewart concerning her so-called proof of death under the policy issued by the Mutual Life Insurance Company of New York, over the objection of defendant to which an exception, at the time, was allowed.

6. In admitting and receiving in evidence, over the objection of defendant, Exhibit "21" to which objection an exception was allowed.

7. In admitting and receiving in evidence the letter of Sardam and the so-called proofs of death submitted by Mrs. Stewart regarding the policies issued by the Mutual Life Insurance Company of New York, all included in plaintiff's Exhibit "18," to the offer of which defendant, at the time, objected, the objection being overruled and an exception was duly allowed.

8. In admitting and receiving in evidence the letter of March 23, 1921, by Sardam to the Mutual Life Insurance Company to which the de-

fendant, at the time, objected, the objection being overruled and an exception was duly allowed.

9. In admitting and receiving in evidence plaintiff's Exhibit "22" being the affidavit of Maude E. Stewart and her so-called proof of death under policies issued by the Mutual Life Insurance Company of New York to the introduction and reception of which, at the time, defendant objected and the objection being overruled and an exception was duly allowed.

10. In admitting and receiving in evidence plaintiff's Exhibit "23," the affidavit of Paul G. Shotswell, the offer of which was objected to, at the time, the objection being overruled and an exception was duly allowed.

11. In admitting and receiving in evidence plaintiff's Exhibit "24," being the letter from Hayden, Langhorne & Metzger, concerning proof of death, to the offer of which defendant, at the time, objected, the objection being overruled and an exception was taken and duly allowed.

12. In admitting and receiving in evidence plaintiff's Exhibit "25," being the letter of H. G. Fitch, to which defendant, at the time, objected, the objection being overruled and an exception was duly allowed.



13. In admitting and receiving in evidence the letter of F. J. Sardam, March 23, 1921, being plaintiff's Exhibit "27," to the offer of which defendant at the time objected, the objection being overruled and an exception was duly allowed.

14. In admitting and receiving in evidence plaintiff's Exhibit "28," being the original letter of April 18, 1921, by Sardam to the Prudential Insurance Company, and so-called certificates of proof of death signed by Maude E. Stewart, to the offer and reception of which defendant, at the time, objected, objection being overruled and an exception was duly allowed.

15. In admitting and receiving in evidence plaintiff's Exhibit "29," being three affidavits signed by Maude E. Stewart and a letter from Fitch, dated May 13, 1921, to which offer the defendant, at the time, objected, the objection being overruled and an exception was duly allowed.

16. In admitting and receiving in evidence plaintiff's Exhibit "30," being the original affidavit of Paul G. Shotswell, also letters of Hayden, Langhorne & Metzger, to which offer defendant, at the time, objected, the objection being overruled and an exception was duly allowed.



17. In admitting and receiving in evidence plaintiff's Exhibit "31," letter of July 14, 1921, written by Hayden, Langhorne & Metzger, to the offer of which defendant at the time objected, the objection being overruled and an exception was duly allowed.

18. In admitting and receiving in evidence all written statements, memoranda and other papers, annexed to or made a part of all the foregoing instruments offered and received in evidence to all of which at the time defendant first duly objected, the objection being overruled and an exception was allowed in each instance.

19. In overruling the motion of defendant, at the close of the trial and after the reception of all testimony for the dismissal of said action upon the grounds, first, that there was no due or satisfactory proof of death presented to defendant on either of its policies prior to the commencement of the action, or at any time; second, that upon the whole case the evidence was insufficient to justify the conclusion that Frederick L. Stewart was dead, that the evidence in the case did show that Stewart is living, which motion was overruled and at the time an objection to said ruling was duly taken and an exception allowed.

20. The court erred in its oral opinion at the close of the cause holding that Frederick L. Stewart was dead and in further holding that the plaintiff in the cause was entitled to judgment against the defendant.

21. The court erred in making special Finding of Fact "X," to which finding defendant at the time and in writing objected, the objection was overruled and an exception allowed.

22. The court erred in making special Finding of Fact "XI," to which finding defendant at the time and in writing objected, the objection was overruled and an exception allowed.

23. The court erred in its special Conclusion of Law No. "II," which conclusion of law was objected to at the time by defendant, said objection was overruled and an exception duly allowed.

24. The court erred in its special Conclusion of Law No. "III," which conclusion of law was objected to at the time by defendant, said objection was overruled and an exception duly allowed.

25. The court erred in refusing to make Findings of Fact in favor of defendant as proposed by defendant at the time and prior to its making findings in this case, which proposed

findings of fact are in writing numbered from one to six, which proposed findings of fact and each of them were, at the time, overruled by the court and an exception duly allowed to defendant for the court's ruling upon each of said proposed findings of fact.

26. The court erred in failing to adopt the conclusions of law numbered one and two as proposed in writing by defendant prior to his making findings and conclusions in the case, which proposals were at the time overruled by the court and an exception to such rulings being duly allowed.

27. The court erred in signing and entering judgment in said cause against defendant in said case.

### FINAL ISSUES IN THIS COURT.

The above errors may be grouped for the purpose of simplifying the argument into three fundamental questions which, therefore, become the main issues in this Court.

Thus:

ERRORS 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15,  
16, 17 and 18 become

ISSUE I. Were the papers and documents submitted to Plaintiffs in Error before suits were brought, "due proof of the death of Stewart"?

ERRORS 1, 2 and 4 become

ISSUE II. Did the Honorable Trial Court err in admitting evidence concerning the emotions, conclusions and feelings of third parties upon hearing of Stewart's disappearance?

ERRORS 19, 20, 21, 22, 23, 24, 25, 26, 27, become

ISSUE III. Did the Honorable Trial Court err in concluding the issue in favor of Defendant in Error as disclosed by his oral decisions at close of trial, Findings of Fact and Conclusions?

\* \* \*

## POINTS AND AUTHORITIES

### ISSUE I.

Papers and documents submitted did not constitute "due proof of the death of the insured" as required by the Prudential Policies, nor "due proof of the death of Frederick L. Stewart" as required by the Mutual Life Insurance Policies.

### POINT 1.

Sufficiency in form only is admitted by accepting and retaining the proofs without objection. The truth of the statements contained in the proofs is not thereby admitted.

*Crotty v. Union Mut. L. Ins. Co.*, 144 U. S. 621.

At all times, Plaintiffs in Error denied liability solely on the ground that Stewart is not dead.

### POINT 2.

The question as to the sufficiency of the preliminary proofs of death, in this case, is purely a question of law.

*Continental Life Ins. Co. v. Searing*, 240 Fed. 653.

*Security Bank of Richmond v. Equitable L. Assn.*, 112 Va. 462; 71 S. E. 647.

None of the papers or documents mailed as preliminary proofs of death and received in evidence over defendants' objections threw any light whatsoever on the alleged death of Stewart, *except plaintiff's Exhibit "23,"* being the affidavit of Shotswell, the purser on the boat. Stripped of all detail, Shotswell's affidavit merely states: That he was purser on the boat, he collected the fare from Stewart. When half way across the river and when a half mile from the Kalama dock, Stewart went into the passenger cabin, that was the last he saw of Stewart. That he watched the other passengers get off the boat at Kalama, and knows that Stewart did not get off at that time. If he had gotten off, he would have seen him. That after the other passengers got off, he informed Captain Pomeroy that Stewart did not get

off the boat and then he and Pomeroy “went back and looked through the boat, affiant going around one side and Pomeroy on the other.” They found Stewart’s bag in the pilot house. All the other papers and documents delivered to the companies, in no manner, support Shotswell’s affidavit. Therefore, the only attempt made to prove to the companies that Stewart’s life had ceased, is this affidavit of Shotswell. This affidavit must be read, of course, in conjunction with a letter of counsel for Defendant in Error written to the insurance companies in which letter it was stated that Stewart faced criminal prosecutions from a dozen sources.

So read, we think it clear under the authority of *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300, that due proof of death was never furnished to plaintiffs in error.

## ISSUE II.

Did the Honorable Trial Court err in admitting the evidence objected to in assigned Errors 1, 2, and 4?

### POINT 1.

Under this point, we complain of the admission in evidence of certain statements made by the witnesses Hay and Plamondon at the time they were told of the disappearance of Stewart



and the admission in evidence of the testimony of Hay that when he returned to Kelso at noon-time on March 17th he unloaded all the guns and pistols in the banking house of the Kelso bank. This evidence was offered under the theory that it was a part of the *res gestae*. It needs no citation of authority, we think, to show its inadmissibility for that purpose. When Hay and Plamondon were informed of the disappearance or alleged death of Stewart, they were in the City of Kelso, a place some miles distant from the Columbia River. We quite agree that the statements of bystanders at an accident are sometimes admissible, but these men were not by-standers at the scene of an accident; they were miles away and whatever had occurred had occurred some considerable time before. Their statements were not therefore statements arising from shock. Moreover, it is manifest that the action of Hay somewhere around noon of March 17th in unloading guns is not under any conceivable theory to be considered a part of an occurrence which happened some nine hours later. Nor was this evidence admissible on the theory that it was proof of a predisposition on Stewart's part to commit suicide.



It would probably have been proper to have shown in the case that Stewart himself had told others that he intended to commit suicide provided such statement was made shortly before March 17th, but, we utterly fail to see how what two men, to whom Stewart had never made any such communication, said on the night of March 17th, can be considered the equivalent of a statement by Stewart.

### ISSUE III.

The Trial Court erred in finding for the defendant in error.

### POINT I.

#### SUICIDE.

At the beginning of the trial counsel for defendant in error stated that the case would be tried on the theory that Stewart voluntarily ended his own life and upon that theory the case was tried. It will not, we think, be denied that when the death is admitted but the cause thereof is in doubt, whether accident, self-destruction or some other cause, the presumption is all against suicide. It is held that in such a case the presumption of love of life is so strong that it has the force of affirmative evidence and in order to overcome that evidence one claiming that suicide was the cause of death must introduce proof which will exclude every

reasonable hypothesis other than that of suicide as the cause of death.

Out of the legion of cases so holding we cite and quote from only a few.

In *Travellers' Ins. Co. v. McConkey*, 227 U. S. 661, the trial judge charged the jury as follows:

“It is manifest that self-destruction cannot be presumed. So strong is the instinctive love of life in the human breast and so uniform the efforts of men to preserve their existence, that suicide cannot be presumed.”

The correctness of this instruction, among others, having been challenged, the United States Supreme Court in passing on the point said:

“In respect to the issue as to suicide, the court instructed the jury that self-destruction was not to be presumed. In *Mallory v. Travellers' Ins. Co.* 47 N. Y. 52, 54, which was a suit upon an accident policy, it appeared that the death was caused either by accidental injury or by the suicidal act of the deceased. ‘But,’ the court properly said, ‘the presumption is against the latter. It is contrary to the general conduct of mankind; it shows gross turpitude in a sane person.’ ”

In *Neasham v. New York Life Ins. Co.*, 244 Fed. 556, the court said:

“Primarily the presumption is against self-destruction, and it is one of the *strongest* presumptions with which courts have to deal. Being, as it is,

entirely opposed to natural instinct to deliberately take one's own life, the fact will *never* be inferred unless the evidence is such as to fairly *exclude every other reasonable hypothesis* as to the cause of death. Of course the presumption will not prevail against clear and definite proof; but if the circumstances are consistent with any other reasonable theory, the latter must be adopted to the exclusion of that of suicide. These principles have become *axiomatic* in their application."

In the case of *Lindahl v. Supreme Court I. O. F.*, 100 Minn. 87, 110 N. W. 358, 8 L. R. A. (N. S.) 916, 117 A. S. R. 666, it appears that the lower court instructed the jury:

"In this class of cases the rule is that every reasonable hypothesis for accounting for death other than suicide should be excluded from the case before you can conclude that it was suicide and then only of course from evidence warranting that conclusion."

The Supreme Court of Minnesota held that this instruction was correct, saying:

"The issue being the fact of suicide, it is for the defendant to prove this ultimate fact by a fair preponderance of the evidence. It starts with the burden of overthrowing the presumption that a person does not voluntarily destroy what is commonly regarded as the most precious of all possessions, life itself. When the fact of death appears, the law presumes that it must have resulted from causes which were not voluntarily brought about by the deceased. Death may result from innumerable causes. The facts of a case may suggest accidental shooting, poi-

soning or drowning. If the evidence is consistent with the theory of either, the presumption which the law raises from known and recognized controlling forces of human nature requires the conclusion that the death was accidental. If the known facts are consistent with a cause of death which does not involve self-destruction, that cause must be accepted. After all the hypothesis which are consistent with an innocent or accidental death are eliminated, the conclusion of suicide may then be drawn. The burden is upon the defendant to show that the circumstances and conditions are inconsistent with any other reasonable cause of death than that of suicide; that is, it must eliminate and disprove all other causes of death which are consistent with the evidence before the jury is justified in inferring that the deceased committed suicide."

See also—

*Stephenson v. Bankers' Life. Ins. Co.*, 108 Ia. 637, 79 N. W. 459.

*Wood v. Sovereign Camp of Woodmen of the World*, 166 Ia. 391, 147 N. W. 888.

*Kornig v. Western Life Indemnity Co.*, 102 Minn. 31, 112 N. W. 1039.

We utterly fail to see why the doctrine of these cases is not applicable here. The reasons for the rule are stated to be: The instinctive love of life; that suicide is contrary to the general conduct of mankind, that it shows gross moral turpitude in a sane person. If the evidence shows that two roads are open to a man in the position of Stewart, by one of which he may disappear, but if he pursues the other

he will meet only a quick and speedy death, why should it not be presumed that he did not take the road which leads to death.

Now, if the general rule is applicable in the case at bar, can it be said that the facts and circumstances in this case, even if defendant in error's evidence alone be considered, exclude every other reasonable hypothesis other than that of suicide, as the cause of his disappearance?

The trial court, at the very close of the trial, the evidence fresh in his mind, frankly acknowledged his inability to find the *fact* of death established, but bases his conclusion of death upon a presumption that Stewart committed suicide. For, he states in his oral opinion: "In this case the court is asked to choose between the theory that he destroyed himself physically by his own act and the theory that he banished himself from his friends and relatives forever and became a wanderer and a tramp on the face of the earth, constantly on the alert, scanning every face for some look of recognition. You say he was a longheaded man. If he was he must have known that was the fate that awaited him if he fled."

Again referring to suicide, he states: "Therefore, the fact that he did many things on the trip



down to attract attention to himself weighs about as much one way as the other. That is, he wanted everybody to recognize him so that each step could be traced, whichever motive was in his mind. That conduct would be about as natural in the one case as the other.

His getting on the boat and his conduct from there on it seems to the court that more reasonable explanation of it is that it was suicide, because whatever did happen he could not have anticipated that that is the way it would turn out.”

## POINT 2.

### INSUFFICIENCY OF EVIDENCE SUBMITTED BY DEFENDANT IN ERROR.

Irrespective of any rule relative to suicide and conceding the credibility of all witnesses who testified on behalf of Defendant in Error, the testimony falls short of establishing the death of Stewart. This is the only issue of fact in the case. It was decided by the lower court on presumption, without proof of the fact.

We believe it will be of assistance to the court, at this point, to give a brief summary of all the evidence upon which the lower court based his

presumption of death, believing that no such presumption is justified therefrom.

The record in this case is quite voluminous, made so by reason of much irrelevant and immaterial matter being injected into it and in preparing the transcript for this court, it was not possible to eliminate all the immaterial testimony of the witnesses without interfering with the intelligent understanding of what remained.

Eliminating all details, explanations and conclusions, the real substance of what was shown by the plaintiff on the trial by her witnesses, in the order in which they testified, is, substantially, as follows:

Claude P. Hay was the bank commissioner of the state at the time of Stewart's disappearance, March 17, 1921. He went to Kelso on the evening of March 16th to determine what action should be taken with the affairs of the bank. Early next morning he and Stewart went to Portland to see E. S. Collins or any other person or persons there from whom financial assistance might be obtained for the bank. No assistance was obtained. Hay returned about ten o'clock that forenoon to take possession of the bank, in his official capacity,



which he did that day. Stewart was laboring under great excitement.

H. E. McKenney is a practicing attorney at Kelso. He was appointed administrator of Stewart's estate soon after his disappearance. Claims aggregating \$72,000 were filed against the estate. The estate inventoried "in the neighborhood of \$160,000." All of the real estate was encumbered and the estate was insolvent.

A. E. Stevens was in the automobile business in Portland. Stewart told him that his car was coming to Portland. Stewart talked about having his car shipped to California. Then he decided not to do that. The car did come from Kelso to Stevens' Garage on the order of Mrs. Stewart.

George F. Plamondon was assistant cashier in the Stewart bank. The bank was closed on the evening of the 16th in the ordinary way. The money and the books were placed in the vault and the vault was locked with the time lock set for eight o'clock the next morning. Stewart's account was often overdrawn.

Robert W. Roberts was porter at the Union Station, Portland, March 17, 1921. He knew Stewart. Four o'clock in the afternoon Stewart drove

up to the Union Station in a cab, he spoke to Stewart and Stewart spoke to him. He took Stewart's baggage inside the door. Stewart paid the taxi man and dismissed him. He did not come in the building at all. He just walked around in a quandary undecided which way to go. Then Stewart told him to bring the baggage out, put it in another taxi then drove away.

Clyde Hansen drove Stewart in an automobile from St. Helens to Goble between seven and eight o'clock on March 17th. Stewart got off the passenger train at St. Helens and as that train was about to start on its way through Goble, Stewart employed Hansen to bring him to Goble in an automobile. Hansen had known Stewart for many years but did not recognize him that night. When he arrived at Goble, Stewart paid his bill and then made himself known to Hansen, and stated to Hansen, as he was leaving, that he was going to a telephone to 'phone his wife. He then went to the ferryboat, known as the "Queen," which ferryboat carries passengers between Goble on the Oregon side and Kalama on the Washington side of the Columbia River..

T. H. Adams, special deputy supervisor of banking, was in charge of Stewart's bank since his disappearance. In his opinion the bank was in-

solvent from 1910 down to the time of Stewart's disappearance on March 17, 1921. There was no apparent change in the condition of the bank since six months previous to March 17, 1921. (108-111).

Carl H. Hayes was associated with Stewart in some transactions prior to the latter's disappearance. He took Stewart's car from Kelso to Portland and put it in the Haynes Garage on the 17th of March, 1921. He arrived in Portland about four o'clock. He went back to Kelso on the North Bank down the north side to Rainier. He saw Fred Stewart on the train, talked with him a little. Stewart talked in a low voice that he could not understand very well, he talked about the bank. Stewart asked him to leave him while he got a little sleep. Hayes sent back to call him when they got to Rainier but he was not on the train and Hayes supposed that Stewart got off at Goble. Three other people from Kelso were on the train with Hayes. He and they took the ferryboat from Rainier to Kelso. (111-119).

Frank J. Sardam lived in Portland, was a life insurance agent for the Northern Life. He was in Kelso on the night of March 17, 1921. He had been in Kelso and at Stewart's home for five days previous, his wife was with him. Mrs. Stewart

wrote him to come down. Stewart seemed very nervous. He looked like he was about to collapse. He told Hayes to take the car to Portland. On the night of March 17, Sardam and his wife were at the Stewart home. About nine o'clock that night the telephone bell rang. Sardam went to the telephone and discovered it was Stewart who called up. Stewart said he would be home in about forty minutes. He inquired about his wife and son, but did not talk with his wife. (119-129).

F. A. Byrd is a practicing physician. He formerly lived at Kelso and was coroner of the county for two terms. He was familiar with the Columbia River. He remembered that people were drowned in the Cowlitz River and their bodies never found. He recalled where a lady was drowned in the Columbia slough and the body was never found. He said persons were drowned in the Columbia River whose bodies were never found. (130-140.)

William J. Pomeroy was the man in charge of the ferryboat Queen on the night of March 17, 1921. Stewart got on his boat before he left Goble. There were six passengers on board including Stewart. Stewart went into the cabin when the boat was about half was across the river. The schedule across the river is nine or ten minutes. When the

boat landed the passengers had to pass him or jump over the rail. All the passengers got off but Mr. Stewart, he left his grip in the pilot house. All the passengers had paid their fares and the fares had all been turned in and then Stewart paid his fare. Stewart was in plain view of Pomeroy when he paid the dollar to Shotswell. Pomeroy thinks one of the cruisers was out there all the time they were coming across. When the landing was made at Kalama, it was raining and the wind was blowing and the passengers naturally hurried off and up the slip. Sometimes he counted the passengers when they got off, not often. The guard on the water line of the boat projects out three or four inches. A person might step over the railing at rear platform, holding on to the windows, walk around on that guard. He testified he would not do it unless he was forced. Some of the life-preservers were piled up on that platform on the stern of the boat. (140-161).

Paul G. Shotswell was purser on the Queen on the night in question. He had known Stewart for fourteen years. Fred Stewart was a passenger on the boat on the evening of March 17, 1921. After he collected all the fares and turned them in, Stewart paid him a dollar, he went into the pilot house,



got the change and brought it back to Stewart. He paid his fare after the boat was half way across the river. Shotswell saw all the passengers get off except Mr. Stewart. They looked through the boat and Stewart was not there. He did not see Stewart get off. (162-168).

John Scanlon, a timber cruiser, was on the ferryboat Queen with Stewart on the night of March 17, 1921. After he paid his fare he and the two young men who were with him, and working under him, went into the cabin of the boat. One party came down into the cabin, looked around and then walked out, then another man walked down into the cabin with a brief case in his hand, a tall man with a long overcoat on. He stood and looked around, looked over at him, and looked at them, and walked right out of the door on to the stern of the boat. A few minutes afterwards the two young men walked out of the same door. In a few minutes they returned into the cabin, then he and they went out on the deck, got their packs and went ashore. As they started up the wharf he says one of the young men asked if he saw that man come back into the cabin and he replied he did not. After he and the young men got to their room the captain of the boat called to inquire about a man that was missing. He was

asked if he had seen this man go out the back door of the boat, and he replied, yes, we seen him go out but we had not seen him come back in. While he was going up the incline he did not hear anyone state that a man had been lost, neither he nor the two young men with him made any statement to the man in charge of the boat or the other passengers about a man being lost or having fallen overboard. (168-171).

Raymond Schorer was one of the young men with Mr. Scanlon on the boat. He testified that he, Mr. Scanlon and Mr. Curtis, went into the cabin and when they were about half way across the river this man supposed to be Mr. Stewart came into the cabin. He stopped and glanced in the engine room, looked up and went to the back door and out. In about four minutes, or such a matter, after then, Mr. Curtis and he went out. When he and Curtis went out he did not see this man and he states: "He said he did not either, and did not think much about it." They came back in and nothing more was said about it until they got off the boat and went up the slip by the depot. He made no statement about Stewart's absence to anybody. He testified that neither he nor the young man that was with him made any search for Stewart when they went out. About one



or two minutes after they went out the whistle blew for the landing and they went back in. He did not hear anyone give the alarm that Stewart was lost overboard. (171-175).

Mr. Pomeroy testified that the whistle for the landing is given four or five hundred feet from the dock at Kalama and that it would take one minute to get to the dock after the whistle was sounded. (175).

H. L. Curtis was the other young man with Mr. Scanlon. He testified about leaving the dock at Goble. They went into the cabin and stood there reading the signs on the wall when a tall man with a long overcoat and a brief case in his hand came in, stopped, glanced around the cabin, and went out the back door. Soon afterwards he and his companion went out and did not see the man who had preceded him, they went back in the cabin and said nothing about the man being missed. After they went to the hotel and went to bed two men came to the door to inquire. After they went up the slip he heard no alarm given about a man being lost. He testified that he is not accurate as to the time that he went out on the rear deck or how long he remained out there, he does not remember the whistle being sounded. He thinks when he went out on the back

deck that he and his companion mentioned something about the other man not being there. When they went out it was raining and the wind was blowing, it was a bad night. (176-178).

Louis M. Plamondon was formerly associated with Stewart in the bank. He is a friend of Stewart. On the 15th he got a communication from Carothers, president of Stewart's bank. He testified that he went to Kelso, made an examination of the Stewart bank and then made a report to the bank commissioner as to the condition of the bank on the 15th or 16th of March, 1921. He does not testify why the president called him to the Kelso bank, and why he made the examination and why he afterwards reported directly to the bank commissioner. He testified that he and others had been figuring on a reorganization of the bank if it was humanly possible. They came to the conclusion that the amount of money they had, \$50,000, plus the entire liability of Stewart to the bank, if all paid, would not have saved the institution. He says his report was mailed to the bank examiner Monday, March 14th. The witness is the brother of George Plamondon, and Mr. Carothers, the president of the bank, is the father-in-law of George Plamondon. Prior to March, witness knew that the

Stewart bank had been criticized by the banking department, he had known that for several years. He talked with Stewart about the criticisms made by the banking department of the state and Stewart generally laughed at the criticisms, he always did. (178-184).

Maude E. Stewart, the wife of Frederick L. Stewart, testified that she was married to Stewart in 1910. She testified that after Stewart returned from Olympia on March 6th he was a physical wreck and she invited Sardam and his wife to come down and visit them. He was extremely pale, he ate very little and slept very little. On the night of the 16th he stayed at the bank until about one o'clock in the morning. When he came home he said "I am afraid they are going to close the bank, there is only one more chance, Mr. Hay has asked me to go in and see Collins in the morning and we are going in on the five o'clock train." Before the witness left the witness stand counsel for plaintiff requested her to state "just at the time he took his departure what took place?" on the morning of March 17th, when he left for Portland. And the witness answered, "Just before he left he went into the room and took our little boy up out of his bed and went directly to the door and he came

back three different times.” On March 18th she received the letter marked Plaintiff’s Exhibit “16” and testified that she had not heard from him since. She left Kelso on March 28th, 1921, and has not lived there since, except was back from August 4th to August 18th, 1921, and from March 12, 1922. (184-197).

J. W. Hogett, sheriff of Cowlitz County, testified. On the night of March 17, 1921, Captain Reid called him over the 'phone and told him that Stewart was overboard. He went down to the dock and made an investigation as to the rumor of Stewart being lost overboard. He testified that Captain Reid told him that Stewart did not get off the boat. (197-200).

William Stuart, prosecuting attorney of Cowlitz County, testified. On the night of March 17th, 1921, Captain Reid called him at about 9:45 and informed him about Stewart falling overboard. He testified that he went to Kalama afterwards, talked with Captain Reid, who told him that Stewart did not get off the boat. He was requested to issue a warrant for Stewart’s arrest but refused to do so. (200-201).

Chris Hansen testified that his occupation is

that of diver and that he was familiar with the bottom of the Columbia River at Kalama. On the bottom of the river there are snags. The water is all the way from thirty feet to sixty-eight feet deep, it was high on the night of March 17th, 1921, about twelve feet above normal. The bottom of the river is very rough in some places, it will form holes and banks, in different places there will be piles of snags. If a body is caught in these snags it might be difficult for it to rise. (201-210).

G. H. Thayer testified that he has worked on boats on the Columbia River. He knew of a number of instances where persons were drowned and their bodies never recovered. (210-212).

While the witness Adams was on the stand it was stipulated by counsel for plaintiff that Stewart had appropriated to his own use several thousand dollars belonging to an estate which he represented, subjecting him to arrest, and if the charges were proven, to a sentence in the penitentiary. And among the proofs of death the following appears in plaintiff's Exhibit "31," being a letter written July 14, 1921, to the Prudential Insurance Company concerning the payment of the Stewart policies: "The facts are—and they can be amply proven—that Mr. Stewart faced criminal prosecu-



tion from a dozen different sources had he returned to Kelso, Washington, from Portland, where he went on the morning of March 17, 1921, in company with Claude P. Hay, State Bank Examiner."

Besides the foregoing testimony, there was received in evidence the two letters Exhibits "16" and "17," (186-195). Exhibit "17" is without date and there is no way of knowing when it was written. It was found in the bank after Stewart left—so it was written prior to March 17th. Exhibit "16" is dated March 17, 1921. The first paragraph reads: "If anything should happen to me before we get things straightened out I want to make these suggestions as to how to handle things for your best interests and those of everyone who have looked to me for protection." 191.) In the second paragraph of Exhibit "16" he wrote: "The whole thing has made me sick and I feel shaky, but think I will make it O. K. *If anything should happen to me* remember that I have \$86,000 of life insurance policies in the vault in your favor and about \$50,000 of accident policies all paid up to date. I want you to collect it all and have the Sardams help you. Make up to them any loss they have if they shall have any." (186-187.) In each letter he gives the wife



about the same instructions relative to the payment to certain persons from whom he misappropriated money. Certain photographs of the ferryboat Queen,—ferryboat Elf—and the dock were received in evidence.

The foregoing is the substantial evidence offered by Defendant in Error when she submitted her case at the trial. We maintain it contains no substantial evidence to establish Stewart's death.

However, it does appear from this evidence, Stewart disappeared after going aboard the ferryboat Queen. He had ample reasons for immediately disappearing from the State of Washington, and he had the choice of two courses, self-destruction or escape. Which did he choose? Instead of clarifying the situation, this evidence involves the main issue into deeper mystery, and instead of aiding the Court in presuming death, precludes it from doing so.

Salient facts established by this evidence showing that Stewart planned and carried out his escape are:

1. He had almost every reason imaginable to make his escape. His standing in the community was gone; his reputation was gone; he was a con-

fessed embezzler; he dragged his bank down to utter ruin; he was insolvent and he “faced criminal prosecutions from a dozen different sources.” (Defendant in Error’s Exhibit “31”).

2. It must be conceded that these awful misfortunes might lead one man to despair and self-destruction, another to escape and total disappearance from the sight and knowledge of all his former acquaintances. To which class did Stewart belong?

Where suicide is to be proven, the most cogent fact to be offered is a predisposition to self-destruction. Such as threats to do so while in a state of gloom or despondency, acts or conversations indicating such a disposition covering some period of time prior to the actual suicide. Almost invariably the person driven to self-destruction possesses a sensitiveness to trouble, misfortune and grief.

All of these were absent in Stewart. His bank was practically insolvent for years. The state banking department’s criticisms served as occasions for his mirth and laughter only. (183). Exhibits “16” and “17” wherein he recites the various sums of money misappropriated do not indicate much sensitiveness of either feeling or character.

If he intended suicide it would seem the im-

pulse so to do must have reached him when Hay left to take over the bank. If he contemplated suicide to avoid further disgrace by being arrested and sent to the penitentiary he would hardly have started back to Kelso.

Not a word of evidence is offered to show any disposition on Stewart's part to commit suicide. The first and only time in his life he intimates suicide is found in said letters Exhibits "16" and "17." If he planned escape and disappearance these are exactly letters he would leave behind to mislead. In reading these letters such a scheme is somewhat disclosed. He speaks of "debts of honor," "take me down to Riverside to be buried," "make a good excuse for you to come back up here—you could stay in Portland or Tacoma most of the time—" If he contemplated an escape, no plan to successfully do so could possibly be complete without just such a letter, nothing could be more natural.

3. The facts developed by this testimony justify the inference that Stewart planned and successfully made his escape.

On March 16, 1921, he received final word from the banking department that he must sever his connection with the bank. He had received

other demands from the State Banking Department concerning the bank, and he paid no more attention to this request than he had to any other request from that department. He never did resign. And the banking department did not come to take possession of the bank until it was practically requested to do so by Louis Plamondon, who lived at Woodland, Washington, and was not connected with the management of Stewart's bank. (178-179.) This examination was made about the 14th of March, on which date a copy of Plamondon's report was sent to the banking department. That report, as explained by Plamondon himself, showed the bank hopelessly insolvent, and when sent to the State Banking Department by an outsider would have but one result, the closing of the bank. From all this, it is fair to infer that Plamondon was acting for Stewart. (180). Stewart was then ready to leave and to leave forever. But he wanted the banking department to take charge of the bank. And after Hay came for that purpose he did not take the bank over but requested Stewart to go with him to Portland in an endeavor to raise money to tide the bank over.

Five days before his departure his friend Saram and wife were requested to come and stay at

Stewart's home. On Stewart's return on March 17th, before taking the ferryboat at Goble, he telephoned his home previously, saying he wanted to talk with his wife. Sardam from Stewart's home answered the call. Stewart talked with him but did not talk with his wife. If Stewart had planned making his escape on reaching Kalama he was anxious to know if the means of transportation were ready.

After Stewart's disappearance, Sardam was prompt and faithful in carrying out the requests made by Stewart in his letters, Exhibits "16" and "17," in the collection of the life insurance policies. His fidelity was so keen in that particular that he falsely wrote all the life insurance companies "that some of the companies had agreed to make settlement if bond were furnished." As a witness he admitted that no company had agreed to pay and that a statement in the letter to the companies, in that particular, is false.

He probably did not fear that Hay would do anything to hasten his arrest, but some of the persons he took money from might, and so to appease them he telephoned Hay about the middle of the afternoon he had raised the money. (86.)



4. Nothing appears in the record as to what Stewart was doing between ten o'clock in the forenoon of March 17th and the time he went to the depot to take the train, except his call at Stevens' garage in Portland about two o'clock P. M.

The manner of his departure from Portland on that day, his going first to the Union Station, conversing with the porter that he knew there, then going to the other station, taking the train that goes between Portland and Astoria, going into a car where none of the other people from Kelso were, telling his friend Hayes to leave him as he desired to sleep, his getting off that train as it reached St. Helens, immediately employing an automobile to take him to Goble, arriving there just as the train he got off was leaving Goble, the pains he took to have the driver of that automobile recognize him, telling the driver of the machine that he was then going to the telephone to talk with his wife, then going down to the ferryboat and talking with Pomeroy, the captain of the boat, placing his grip or hand bag in the little pilot house where the captain stands, so the captain would be sure to observe it when the boat reached the other shore, not paying his fare at the time the other passengers paid, standing out in a conspicuous place,



handing the purser a silver dollar, remaining in the same place until the purser went into the pilot house, got the change and returned to him seventy-five cents, shortly after stepping into the cabin, looking down into the engine room, scrutinizing the faces of the three men in the cabin, then going out on the rear of the boat carrying with him the brief case, all demonstrates that Stewart was carrying out a well defined plan from the time he went to the Union Station until the moment when he went out on the rear platform. The principal part of the plan was, without doubt, to leave witnesses behind him who could testify to his movements, without a hitch, from the time he left the depot until he was last seen on that boat. It is contrary to common sense, reason and experience to claim that a man acting in such a deliberate manner for such a long time had in his mind the determination to kill himself at a certain time and place. If he desired to destroy himself he could have done so in a dozen ways, leaving behind him certain proof of his death, without delay and travel.

From this evidence it appears that Stewart had at least two means of escape from the boat after he went out on the rear deck. He could have put on the life preservers, a pile of which were out on

that deck, and made his escape by floating ashore or being picked up by a boat. (161). He could have walked out along the side of the little ferry-boat on the projecting timber, kept himself concealed until the boat was tied alongside the ferry-boat Elf, when he could have stepped over the railing onto the other boat and walked off without being observed by anyone.

So, if the presumption against suicide be left out of consideration, the inference of escape and disappearance, from this evidence, is more reasonable and natural than the inference of suicide.

The case of *Ashbury v. Sanders*, 8 Cal. 62, 68 Am. Dec. 300, resembles the case at bar in many particulars. There, as here, the only issue involved was the existence or the death of the insured. In the course of the decision the court states:

“The only question of fact in this case, decided by the court below, was the alleged death of Sanders, the defendant. It was shown in proof that Sanders left San Francisco in the bark *Elvira Harbeck*, for Manila that said bark arrived at the Sandwich Islands on the second day of May, 1855, and soon left, with Sanders on board, since which time nothing has been heard of him or of the vessel, or any of the crew; that the insurance on the vessel, as a total loss, had been paid, and the relatives of the master and his wife, who were on board, went into mourning for them, and had given them up

as lost. It was also shown that Sanders was indicted for a felony and had absconded. The trial in the court below was held on the seventeenth of September, 1856, being sixteen months from the time the defendant was last heard of. The case was tried without a jury and the court found the death of the defendant, and the plaintiff appealed to this court.

“This is one of those cases where a question of fact must be settled by presumption, without positive proof. Every system of law must, from necessity, indulge in presumption in certain cases. The presumption may be arbitrary, but still indispensable. Questions must be settled, and all that can be done is to adopt the most reasonable presumption that the case allows; and as presumptions must be indulged, in such cases, it becomes most important that some certain and consistent rule should be adopted.”

The lower court was reversed, and in reviewing cases, holding otherwise, from other jurisdictions, the California Court observed:

“In that case, Paddock was master of the vessel, while in this, Sanders was only a passenger, and a fugitive from justice. In the first instance, Paddock had every inducement to return home; while in the second, Sanders had every reason to remain abroad, and to conceal the fact of his existence from the people he had wronged.”

When a party of good habits, excellent character, of fair business prospects, respectably connected, and of happy domestic relations, having the fullest confidence of his friends and the entire affec-

tion of his wife, and was living in apparent happiness, with no cause for discontent with his condition, the court may, under such circumstances, presume death prior to the expiration of seven years.

But where a party disappears in the circumstances that Stewart disappeared, no such presumption is justified.

*Spahr v. Mutual L. Ins. Co.*, 98 Minn. 471;  
108 N. W. 4.

*Richmond Security Bank v. Equitable L.  
Assur. Soc.*, 112 Va. 462; 71 S. E. 647.

*Hancock v. Am. L. Ins. Co.*, 62 Mo. 26.

At the threshold of the litigation, Defendant in Error was confronted with the burden of proving Stewart's death by a preponderance of the evidence. It was not incumbent on the part of the Insurance Companies to show he is living. To meet that proof she now relies upon a presumption of death and bases that presumption upon facts that more reasonably justify the presumption of his escape and disappearance.

Hence, conceding the credibility of every witness testifying for Defendant in Error, and giving to the other evidence submitted by her its most

favorable application, the presumption of death is unjustified. The trial court, in his oral opinion, frankly states, that in his mind, either theory, that of suicide or of escape, is equally inferrable from the evidence. For he says in the opinion:

“In this case the court is asked to choose between the theory that he destroyed himself physically by his own act and the theory that he banished himself from his friends and relatives forever, and became a wanderer and a tramp on the face of the earth, constantly on the alert, scanning every face for some look of recognition. You say he was a longheaded man. If he was he must have known that was the fate that awaited him if he fled.”

Again referring to suicide, he states:

“Therefore, the fact that he did many things on the trip down to attract attention to himself weighs about as much one way as the other. That is, he wanted everybody to recognize him so that each step could be traced, whichever motive was in his mind. That conduct would be about as natural in the one case as the other.”

So far, we have directed attention only to the evidence of Defendant in Error. We find that the most the trial court could say for it is that it equally supports either theory, suicide or disappearance. The trial court refused to apply the rule of presumption against suicide (40-41) and so he resolved the uncertainty against the Insurance Companies.



We shall next direct the Court's attention to evidence submitted by Plaintiffs in Error, not only showing the manner he escaped but that he is actually living.

### POINT 3.

#### EVIDENCE SUBMITTED BY PLAINTIFFS IN ERROR.

Not only did Defendant in Error fail to establish Stewart's death by a preponderance of her own evidence, but his existence is shown by evidence offered by Plaintiffs in Error. Primarily Defendant in Error must prove the death before any relief can be granted to her. Hence, if the Court were to find our evidence insufficient to prove Stewart is alive, that would not be availing in support of her case.

We believe, however, that the evidence offered by Plaintiffs in Error does establish the fact that Stewart was living after the 17th of March, 1921. This was shown by the disinterested testimony of men who had the opportunity of seeing him.

For the convenience of this Court, we shall now direct attention to the substance of that testimony.



George Elwood, 48 years old, was a traveling salesman, handling barbers' supplies, residing at Laverne, California, and who had lived in the vicinity of Portland for twenty-nine years just prior to his removing to Laverne in 1920. He personally knew Stewart from 1904 to 1920. He operated a barber shop in Kelso for two years, saw Stewart daily, and shaved him twice a week. He saw and talked with Stewart in February, 1920, a little over one year prior to his seeing him in Hanford, California, about March 24, 1921. On or about March 24, 1921, Elwood stopped at Hanford to sell his goods, while there, and, as he was standing in the barber shop of one of his customers, he saw Stewart walking towards him, but a few feet away (281; Exhibit X). Immediately Stewart turned, went back about forty feet and hurried into an automobile and drove away (284). Before Elwood could turn the door and get out, Stewart had turned and was on his way to the automobile (266). All that Elwood testified to as occurring at this time, is corroborated by two barbers in that shop, one of whom cut Stewart's hair but a couple of hours before, the substance of whose depositions are later quoted in this brief. Elwood testifies positively that the man he saw on this occasion in Hanford was Stewart;

he described the walk, carriage and other outward characteristics of the man which corresponded to those of Stewart. Elwood was then on his way north, covering his regular trip up as far as Seattle. He knew nothing of Stewart's disappearance until he reached Cottage Grove, Oregon, where a friend told him of Stewart's disappearance.

Counsel for Defendant in Error devoted hours in the cross-examination of Elwood, and we believe, without any discredit to his testimony.

Benjamin Vienna, 25 years of age, an ex-service man, residing at Hanford, California. He was a barber in the shop referred to in Elwood's testimony, he recalls it was March 23 or 24, 1921. At the time he and Elwood were discussing about the purchase of a strap, when Elwood remarked, "Just a minute, there is a friend of mine," and Elwood rushed out the door, he followed Elwood and recognized the man as the party whose hair he cut that day. This witness described the man in detail from which description, the man had Stewart's chief personal characteristics. When Elwood returned into the shop, he remarked, "An old friend of mine, he don't want to recognize me. I used to shave him, he is an old friend of mine." He recognized the photographs annexed

to the Hanford depositions as a good picture of the man whose hair he cut, and as the man Elwood undertook to greet. (281, 282, 283, 284.)

Paul Koeper, aged twenty-nine, was another barber in that shop. He remembers the time Elwood was at the shop in March 1921. He recalls Elwood saying: "There goes an old friend of mine from Washington" and then rushing out the door to greet him, and when Elwood returned into the shop he said, "The gentleman will not recognize me" (286, 287).

That there might not be any doubt as to the dates Elwood was in Hanford, we produced the testimony of another of Elwood's customers at Hanford, George Hedges, and he testified: "I know George Elwood. I met him last March and did business with him the twenty-first day of March. I bought a pair of clippers from him. Defendant's Exhibit "K" is the check I gave Mr. Elwood when I bought the clippers. This check was delivered by me to Elwood here in the city personally."

Spiro Papalian, owner of a restaurant at Hanford, forty-five years of age, testified that the photographs annexed to the depositions are pic-

tures of a man that was served in his restaurant in March, 1921.

The witness Orvalle Onorato testified by deposition taken at San Diego, California. He was born at Kelso, Washington, twenty-two years ago. At the time he gave his deposition he was in the United States Army, Air Service. He lived in Kelso all his life excepting about four years when he was in Europe, while a child, and three years he was in the army. He was well acquainted with Stewart all the time he lived in Kelso, talked with him, did some business with him. Stewart knew the witness all the time he lived in Kelso. The witness lived only a mile from Kelso, his home was only a few rods from the city limits. He saw Stewart in the city of Pasadena about the 26th of April, 1921. He was riding in an automobile when he saw Stewart. The automobile was approaching Stewart slowly when he saw Stewart. The witness testified, "I took a good look at him from the front, passing to the side and then looking back. I saw his face. I saw him walk away and when I first saw him I was approaching him." There were no pedestrians on the street when I saw Stewart. The witness further states, "If my brother had been walking on the sidewalks where I saw Stewart

walk that day and I saw him just as I saw Stewart and under the same circumstances, I would not have recognized my brother any quicker than I recognized Stewart.”

In answer to a question on cross-examination, the witness stated: “I cannot swear that it was positively he because I have no way to prove it was, but I am positive,” and then the witness testified, “I understand by these questions that Mr. Langhorne wanted me to be absolutely positive *and be able to prove* that that was Stewart. Now, if I do not have to prove anything at all but just testify myself, I testify that that was Fred Stewart I saw in Pasadena. I have no hesitancy whatever in testifying that that was Fred Stewart I saw at that time and place.”

We next produced the testimony of the men in charge of the boat who claimed to have taken Stewart as a passenger from the border between the United States and Mexico to Manzanillo, Mexico.

Arthur E. Pooley was the purser on that steamer, “Mazatlan.” He testified that the boat left San Francisco April 1, 1921, the first Mexican port was Ensenada. It was his business on the boat to look after the freight, general business of



the people, etc. He came in contact with the passengers every day. Defendant's Exhibit "A," a photograph annexed to the depositions, "absolutely resembles a person we carried on that voyage. I think he was in the forties, he was not as fleshy as that picture represents. This picture is a trifle younger than the man I refer to. Defendant's Exhibit "B" is more like the actual look than the other photograph, his face is thinner and he had wrinkles when he pulled back. His hair was brown with a little gray in it. It was wavy. He had a long slim nose, his face was narrowed up to his chin. He was nearly six feet tall and weighed about one hundred and sixty pounds. He stood erect with a habit of throwing his shoulders back, his walk was erect and sedate you might say." Witness testified that the man got aboard at San Pedro or Ensenada. He talked with him during the voyage, talked with him every morning and he called at his room every once in a while. He did not talk to him about his private affairs. He had occasion to see him every day, he ate at the same table with him, he sat opposite Stewart at the table. He received two packages from this man, the packages were about ten inches long, two or three inches thick and three or four inches wide. He delivered these packages back to



this man just before they arrived at Manzanillo, where the man left the boat.

K. Hansen was the first officer on the boat Mazatlan. He testified that they had a man on that trip of which defendant's Exhibit "A," photograph annexed to the deposition, "appears to be a picture. He was about five feet ten inches something like that, he was slim, he looks younger in this picture than he really was when I saw him. The man I saw had a narrower face than this fellow, his hair was wavy, it was something like mine, light brown. I think he got on the boat at Ensenada, he got off at Manzanillo. He ate at the table with me. Defendant's Exhibit "B" does not look so much like him as the other, I suppose I met him more face to face. I would not say that the picture is of that man, but it resembles him, the picture looks exactly like it should be him. I could not swear it is the same man, it is impossible, may be two men look alike."

Captain F. C. Meyer was the captain and navigator of the boat Mazatlan. He was thirty-five years of age, he testified that Defendants' Exhibit "A" appeared to be a likeness or a picture of a passenger on that trip. Defendants' Exhibit "B" appears more as a likeness of the man than Ex-

hibit "A." "The man I saw was not as young looking as this picture, Exhibit "A." His face was not filled out as much. His hair was not black. It was not combed as indicated in this picture Exhibit "B." I conversed with this man. On one occasion and maybe more during a little card game he did not talk much. As far as I can recall, he came aboard at Ensenada. I lost track of him at Le Paz. I first saw this photograph in June, 1921. This man was about six feet more or less, his build was tall and slender, he weighed about one hundred and seventy-five pounds. These photographs are likenesses of a man that was on the ship but I will not swear that that was the man, the photograph of the man that was on the ship. What I mean to say is this: When I saw this photograph for the first time in June last year I immediately saw that I had seen a man of that description somewhere and by refreshing my memory I found that that man had been a passenger on this ship, a man answering that description; now, whether this man, that this photograph resembles is the same man or not, I do not swear to that."

Walter H. Comber, a resident of Corona, California, testified by deposition. It developed on the trial, by the testimony of reputable citizens

of Seattle, where he formerly lived, that his reputation for truth and veracity is bad, and, therefore, we do not ask the Court to consider his evidence at all.

Charles B. Dill a resident of Kelso for fourteen months and who had known Stewart for five years before coming to Kelso, identified the photographs Exhibits "C" and "D", annexed to the Hanford depositions, as good pictures of Stewart, Exhibit "D", being a more recent picture than Exhibit "C." "If I had never seen Stewart in my life I would say that these two pictures were made of the same man. I would say that Exhibit "D" is a good picture of Stewart as I saw him in March of last year. His hair as shown in this picture looks about as it did when he went away, the style of it."

Thomas McDermott a man seventy-one years of age who had known Stewart personally and intimately all the time Stewart lived at Kelso, also identified Exhibits "C" and "D", annexed to the Hanford depositions as being pictures of Stewart.

Harry E. Moores was the general ticket agent at Seattle for the Consolidated Railroad Ticket Office. His testimony shows that there is railroad

communication between Manzanillo, Mexico, and El Paso and Los Angeles. If a passenger had left Manzanillo on April 20, 1921, he would have reached Los Angeles in four days and sixteen hours.

Captain Simpson had lived on the Columbia River for forty-five years, twenty-five of which had been spent as captain of the railroad ferry boat, "Tacoma" plying between Goble and Kalama. He testified, "I should say that the bodies of persons drowned in the Columbia River during all my experience were usually recovered. I do not recall any specific instance where the body was not recovered." As a rule, the March freshets last only about four days, the real flood takes place later in the year, April, May and June. From his experience with the river, an object like a human body fully clothed with an overcoat on, falling from the ferryboat at the place described by the witnesses, would be found at about Cottonwood Island. (260-263).

Daniel McCoy stated that he had lived on the Columbia River since 1895 and at Kalama since 1910, and had been a fisherman on the river during that entire time. That in his experience the bodies of people drowned in the Columbia River had been found; that he had worked a day and a

half searching for the body of Stewart; that there were some five or six other boats engaged in searching for Stewart's body; that some of them worked there every day for a whole week; that some of the outfits engaged in searching for Stewart's body employed two boats. Between these boats a line 200 feet long was stretched and on this line there were fastened sturgeon hooks having an inch and a half or two inch circle. These hooks were placed on the lines about twelve inches apart and then a weight fastened on each end of the line.. By placing a boat at each end of this line it was kept stretched and they were able to drag it up and down the river. Some of the outfits, however, engaged in searching for Stewart's body used barbed wire. He further testified that he had no reason for believing that Stewart's body was covered up in the river at the time persons were engaged in dragging for it. That if Stewart went into the river he would expect to find his body on the bottom east of the Kalama River. The Kalama River is about two miles from the dock in Kalama and below the lowest spot touched by the "Queen" in making the round trip between Kalama and Goble. That when he dragged the river with the hooks he went down as far as the mouth of the Kalama River.



To the best of his knowledge the river was not dragged west of the Kalama River. That if Stewart's body was in the bottom of the river covered up with three, four or five inches of sand or dirt, that sturgeon hooks would not plow down a foot or a foot and a half in the ground. That he had heard of bodies going into the Columbia River that had never been found.

B. K. Bartleson also testified as to the condition of the river. He has been on the Columbia River since 1895, fishing all the time. A number of fisherman got together for the purpose of clearing a space of ground on the bottom of the Columbia River for fishing purposes at that particular place. This man Hansen, who testified, was employed by them as a diver. This drift was located one-third of a mile below the Kalama dock and extended from the Washington shore out about five hundred feet and goes to the Kalama River, about one mile and a half long. In the fall of 1920 and before March 17, 1921, we cleared this drift of snags and chunks and whatever obstructions there were on the bottom so the net could drag on the bottom for catching salmon. On March 17th, 1921, it was pretty well cleared of obstructions. Just beyond the drift that we had there was another, the Kalama



drift, which was alongside ours. In all my experience in the Columbia River, I know of only two bodies of drowned persons that were not recovered.

Captain Reid, the owner of the ferryboat "Queen" dragged the river for Stewart's body for seventeen days and about 25 other persons with boats and tackle searched the river for his body (234). Captain Reid saw an automobile with curtains all drawn standing about a block and a half from the ferry landing the night Stewart was on the boat (230). Captain Reid further testified in some detail that six men came up the slip after the "Queen" landed at Kalama on the night of March 17th, and a like statement was made by Mr. Chisholm one of the passengers on board the boat that night. The trial judge, however, found that these witnesses were mistaken as to this matter and we consequently do not ask the court to consider their testimony in this regard.

On reading the trial court's oral opinion, it will appear that the court did not question the credibility of any of the witnesses quoted who testified to having seen Stewart. But the court did, in substance, say he thought they were mistaken. Excepting Elwood, all the witnesses in this regard testified by deposition and consequently this court

has the same opportunity for judging the credit to be given to them that the trial court had. In weighing the testimony of those witnesses, it should be borne in mind that Stewart was practically a fugitive from justice and desirous of concealing his identity and location. If he saw a person he knew, he would act just as the Hanford witnesses said he acted; he would turn and hasten away as he did when Elwood recognized him. Although counsel spent many hours in the cross examination of Elwood, we believe not a thing developed to discredit him. He was a barber at Kelso, he shaved Stewart and cut his hair many times, was intimately acquainted with him. If any man outside of Stewart's own family would be able to recognize him, surely Elwood was the man. Who could have a better opportunity for such an intimate observation of a man's looks and mannerisms than his barber? If he were the only one who claimed to have seen Stewart, it would not be strange to think he might be mistaken, but other persons also saw Stewart. Vienna, a barber at Hanford, testified to the occasion when Elwood went out to greet Stewart, and corroborates Elwood. This barber identified Stewart's photograph as the picture of the man Elwood greeted, and as the man whose hair he cut the same day.













Another barber in the same shop identified Stewart's photograph as the man who had his hair cut there.

The testimony of the three officers on the steamer "Mazatlan" who claimed to have taken Stewart from the border between the United States and Mexico down to Manzanillo identified a photograph of Stewart as a picture of the man who was on the boat. Captain Meyer saw the photograph within sixty days after he conversed with Stewart, ate at the same table with him and played cards with him.

It was claimed on the trial that the photographs, attached to the depositions and identified by the witnesses, were not representations of Stewart as he appeared in 1921. To show that, defendant in error offered a kodak picture (Plaintiff's Ex. 36) as being a good picture of him at that time. For this court's information, we enlarged the photograph annexed to all the depositions, as well as the kodak picture, and reproduce them in this brief. These reproductions disclose not only that the pictures are of the same man, but also, that his marked characteristics never changed, the passing of time did not efface them.

Upon consideration, therefore, of the testimony

of all these disinterested witnesses, it would appear that Stewart is living.

It must be conceded this evidence is *prima facie* proof of Stewart's existence.

The contention of defendant in error is that Stewart committed suicide on the night of March 17, 1921. It is asserted that Stewart's death by suicide is proven by a preponderance of the evidence because he was known to have been on the "Queen" on that evening and no one saw him get off.

It is obvious, however, that a man in Stewart's position and desiring to disappear might have done so in several ways. For instance, he might have gone out on the rear platform of the boat, stepped over the railing and remained free from detection by holding on the side of the boat and standing on the three or four inch guard. If Stewart pursued that course he might later have walked up the slip unobserved by anyone, for, so far as the evidence discloses, there was a considerable space of time after search of the inside of the boat was made when there was no one on the "Queen," the "Elf," the slip or the street at the head of the slip.

There can be no question that he had strong reasons for desiring to disappear. He was an em-

bezzler and faced prosecutions from a dozen different sources.

Moreover, if he went overboard from the "Queen" it is strange, to say the least, that neither his body nor anything belonging to him was ever found, though diligent search therefor was immediately made. Strange also is it that so many men could be mistaken as to the identity of the man having the marked characteristics which Stewart had.

The trial court concluded that the actions of Stewart until he went on the boat were as consistent with disappearance as with suicide, but despite that conclusion found that defendant in error had proven that Stewart was dead. In view, however, of the evidence, the presumption in favor of the continuance of life and the presumption against suicide, "one of the strongest presumptions with which courts have to deal," we submit that defendant in error has not sustained the burden of proving that Stewart committed suicide on the night of March 17, 1921.

Respectfully submitted,

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